No. 82-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLER ELECTRIC COMPANY and
COLGAN ELECTRIC COMPANY, INC.,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY MILLER ELECTRIC COMPANY AND COLGAN ELECTRIC COMPANY, INC.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, as the court below held, the evidence of Petitioners' regular, continuous and substantial purchases of labor relations services, marketing services, public relations services, manuals, newsletters and other materials and services from Maryland corporations established that Petitioners were transacting business in Maryland and were, therefore, properly venued in the District of Maryland under § 12 of the Clayton Act, 15 U.S.C. § 22.

PARTIES

Plaintiffs in the proceedings below included:

National Constructors Association
Commonwealth Electric Company
The Howard P. Foley Company
Donovan Construction Company of Minnesota, Inc.
Arthur McKee & Company, Inc.
Badger America, Inc.
Catalytic, Inc.
C. F. Braun Constructors, Inc.
Dravo Corporation
Guy F. Atkinson Company
The H. K. Ferguson Company
Jacobs Constructors, Inc.
Pullman Kellogg Division of Pullman, Inc.
Stearns-Roger, Inc.

Defendants in the proceedings below included:

National Electrical Contractors Association, Inc.
Robert L. Higgins
International Brotherhood of Electrical Workers
Charles H. Pillard
Colgan Electric Company, Inc.
Miller Electric Company
H. E. Autrey

Allen L. Bader
Frank H. Bertke
Donald C. Cates
Robert W. Colgan
Joe R. Devish
Carl T. Hinote
Allan H. Stroupe
L. R. McCord
Aldo P. Lero
Lowell C. Timm
John Ostrow
C. W. Stroupe
Warren Losh
J. D. Hilburn, Sr.

DISCLOSURE OF CORPORATE AFFILIATIONS

Guy F. Atkinson Company—A wholly owned subsidiary of Guy F. Atkinson Company of California, which is a publicly owned company.

Badger America, Inc.—A wholly owned subsidiary of the Badger Company, Inc. which in turn is a wholly owned subsidiary of the Raytheon Company. Raytheon Company is a publicly owned company.

Blount Brothers Corporation—Blount Brothers Corporation is a wholly owned subsidiary of Blount International Ltd. which in turn is a subsidiary of Blount, Inc. which is a publicly held company.

C. F. Braun Constructors, Inc.—A wholly owned subsidiary of C. F. Braun and Company, which in turn is a subsidiary of Santa Fe International Company, a publicly owned corporation.

Catalytic, Inc.—A wholly owned subsidiary of Air Products and Chemicals, Inc., a publicly held company.

Donovan Construction Company, Inc.—A wholly owned subsidiary of Donovan Companies, Inc. a publicly owned corporation.

H. K. Ferguson Company—A wholly owned subsidiary of Morrison-Knudson Company, Inc. which is a publicly held corporation.

Fluor Constructiors, Inc.—A wholly owned subsidiary of Fluor Corporation, a publicly held company.

Jacobs Constructors, Inc.—A subsidiary of Jacobs/Wiese Constructors, Inc. which in turn is a subsidiary of Jacobs Engineering Group, Inc., a publicly held company. Other companies which are subsidiaries of Jacobs Engineering Group, Inc. but which are not wholly owned subsidiaries are: Jay Property Systems, Inc.; Jacobs Constructors of Puerto Rico, Inc.; Zellars-Williams, Inc.; Ohio-Atlas Construction Company; Quality Development Associates, Inc.; Cameron Engineering, Inc.; Southern Instruments, Inc.; The Pace Company Consultants and Engineers, Inc.; UMC, Inc.; Jacobs International Ltd., Inc.; Allen M. Campbell Company General Contractors, Inc.; UMC of Louisiana, Inc.; and Jacobs International Ltd.

Henry J. Keiser Company—A subsidiary of Raymond Keiser Engineers, Inc. which in turn is a subsidiary of Raymond International, Inc. which is a publicly held company.

Koppers Company, Inc. Engineering and Construction Group—A wholly owned subsidiary of Koppers Company, Inc. a publicly owned corporation.

Leonard Construction Company—A wholly owned subsidiary of Monsanto Enviro-Chem Systems, Inc. which in turn is a wholly owned subsidiary of Monsanto Company, a publicly owned corporation.

Litwin Corporation—A subsidiary of AMCA International Ltd., a publicly held corporation.

Lummus Construction Company—A wholly owned subsidiary of Lummus Group, Inc. which in turn is a wholly owned subsidiary of Combustion Engineering, Inc., a publicly held corporation.

Mid-Valley, Inc.—A wholly owned subsidiary of Brown & Root, Inc. which in turn is a wholly owned subsidiary of the Halliburton Company, a publicly owned company.

Parsons Constructors, Inc.—A subsidiary of Parsons Corporation, a publicly owned company.

Procon Incorporated—A wholly owned subsidiary of Procon International, Inc. which is in turn a wholly owned subsidiary of UOP, Inc. which in turn is a wholly owned subsidiary of the Signals Companies, Inc. a publicly held corporation.

Stearns-Roger—Stearns-Roger, Incorporated is now known as The Former Stearns Roger of Colorado, Inc., which is a wholly owned subsidiary of Stearns Roger World Corporation which in turn is a subsidiary of Air Products and Chemicals, a publicly held corporation.

Wismer & Becker Contracting Engineers—A wholly owned subsidiary of Guy F. Atkinson Company of California, a publicly owned corporation.

Dravo Corporation—A publicly held company with the following subsidiaries: Ratcliffe International Sales Company, Inc. and Holmes Company, Inc.

Kellogg-Rust Constructors, Inc.—The successor to Pullman Kellogg, Division of Pullman, Inc., is a wholly owned subsidiary of The Signal Companies, a publicly owned corporation.

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I

STATUTORY PROVISIONS

The relevant statutory provision is:

15 U.S.C. § 22, § 12 of the Clayton Act.

II

COUNTERSTATEMENT OF THE CASE

Colgan Electric Company, Inc. is an Ohio corporation headquartered in Toledo, Ohio and Miller Electric Company is headquartered in Jacksonville, Florida. Both

companies are engaged in the business of electrical construction.

The evidence before the court below showed that Colgan and Miller, as essential parts of carrying out their business, regularly and continuously purchased substantial amounts of servicses and materials from Maryland corporations. These services and materials were, according to Colgan and Miller officials, vital and essential to their companies' ability to operate.

Colgan's and Miller's most significant transactions with Maryland companies were their purchases of services from the National Electrical Contractors Association (NECA) in Bethesda, Maryland. The evidence established that Colgan and Miller were members of NECA since 1949 and 1932 respectively. As NECA members, Colgan and Miller paid services charges and dues to NECA to acquire numerous services that, according to Colgan and Miller officials, were essential to their companies' ability to perform electrical construction work.

The services purchased from NECA included labor relations services, marketing services, public relations services, representation with Congressional bodies, development of legislation, code making and particularly electrical code making services. Colgan and Miller also received valuable manuals, studies, newsletters, and trade magazines. According to Colgan's president, NECA's manual of suggested labor costs was extremely important to his company for developing its labor unit costs. Colgan made similar use of NECA's yearly survey listing average overhead costs. In 1977-78 NECA offered over 130 business services which were purchased and used by Colgan and Miller.

Colgan's and Miller's purchases of these services and materials was regular, continuous and substantial. Between 1970 and 1977 Colgan and Miller paid NECA in

Bethesda, Maryland the following amounts annually to purchase these services and materials:

	Colgan	Miller
1970	$ 2,824.55	$3,025.11
1971	3,354.09	3,113.03
1972	3,621.61	3,733.05
1973	3,708.60	3,934.55
1974	5,060.00	5,310.00
1975	6,340.00	8,256.58
1976	7,129.00	9,925.00
1977 (January-June)	11,542.00	7,117.00

Colgan & Miller Appendix at 46a-47a.

In the second half of 1977 when the National Electrical Industry Fund became the substitute for NECA service charges, Colgan paid an additional $19,000 and Miller an additional $41,000 to NECA in Bethesda, Maryland to purchase these services and materials.[1]

Colgan and Miller officials testified at their depositions that the NECA services their companies purchased were highly valuable and extremely important to their companies' business operations. As the district court succinctly stated:

> Both Colgan and Miller expended somewhere in the neighborhood of $44,000 between 1970 and mid-1977 for the services NECA provided. Each corporation considered its membership in the association to be a highly important aspect of its business activities, and took every opportunity to make that membership known to others. Robert Colgan, president of Colgan Electric, wrote an article in the Electrical Contractor Magazine (a NECA publication) in September, 1976,

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[1] During the 1970-1971 period Colgan paid over $162,817.66 and Miller an additional $302,260.55 to NECA's local chapters for services provided by those organizations.

> in which he averred that his company's investment in NECA was an investment in his business, the entire industry, and even in the country. Exhibit B to Plaintiffs' Opposition. In the same vein, H.E. Autrey, president of Miller, testified at his deposition that membership in NECA was the corporation's "total way of life in the construction industry." Autrey deposition at 55-56. The nature of the NECA services themselves indicates how intimately related they were to the conduct of the two corporations' business: NECA assisted in collective bargaining, marketing, public relations and political lobbying, among other services.

Colgan & Miller Appendix at 49a.

Although unnecessary to the lower court's decision, there was additional record evidence that Colgan and Miller regularly transacted business with Maryland companies. For example, since 1971, Colgan, on almost a monthly basis, purchased parts and machine repair services from the Black & Decker Company in Towson, Maryland. These purchases exceeded $6,600 for the 1971-77 period. In the same time period Colgan also had business dealings with other Maryland companies such as the Rouse Company and Arundel Asphalt Company. The evidence below also established that Miller had similar dealings with the Black & Decker Company and other Maryland companies.

The court below, applying the teachings of this Court's decisions in *United States v. Scophony Corporation*, 333 U.S. 796 (1948) and *United States v. National City Lines*, 334 U.S. 573 (1948), correctly held that this evidence of Colgan's and Miller's purchases from Maryland based NECA showed they were transacting business within Maryland within the meaning of § 12 of the Clayton Act and, therefore, were properly venued in Maryland.

III

ARGUMENT

This Petition does not warrant review by this Court since it only presents questions concerning the sufficiency of the evidence relied on by the lower court to find that Petitioners were transacting business and, therefore, venued in Maryland.

The decision below does not conflict with the decisions of this or any other court and Petitioners do not seriously claim any conflict. Nor does the decision present any important questions of federal law. To the contrary, the lower court's decision reflects a careful and correct application of settled venue principles to the factual record below. And, the evidence of Petitioners' transactions with Maryland corporations demonstrates that the lower court's decision was unquestionably correct.

Petitioners' quarrel with the decision below reduces itself to a claim that simply because NECA is a trade association, the evidence of Petitioners' large and continuous purchases of valuable business services and materials from NECA should have been discounted or discarded. The court below, however, correctly focused on the commercial nature of the services and materials purchased—not on the identity of the supplier of these services. It found that Petitioners' regular, continuous and substantial purchases of vital business services and materials from NECA in Maryland demonstrated Petitioners were transacting business and properly venued in Maryland.

Since the questions raised by Petitioners revolve solely around the sufficiency of the evidence below, the decision involves neither a conflict with other decisions nor important questions of law and because, as in all venue decisions, the lower court's opinion turns on the unique facts of this case which are unlikely to recur, this case is patently unsuited for review by this Court.

A. The Lower Court's Decision is Consistent With The Transacting Business Test of Section 12 of The Clayton Act and the Authorities Interpreting That Section

Under the special venue provisions of Section 12 of the Clayton Act, a corporation is venued in any district where it "transacts business." In at least three cases this Court has exhaustively analyzed Section 12's "transacting business" test and established guiding principles for the lower courts to follow in applying that test. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States v. Scophony Corporation*, 333 U.S. 795 (1948); *United States v. National City Lines*, 334 U.S. 573 (1948).[2]

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[2] The general principles established by this Court are well known. The test of venue is the practical, everyday business or commercial concept of doing or carrying on business of any substantial character in the district. *United States v. Scophony Corp., supra*, 333 U.S. at 807. Congress directed such liberally construed venue provisions "to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, more convenient enforcement of antitrust prohibitions." *United States v. National City Lines, supra*, 334 U.S. at 583. Whether a corporation is transacting business within the meaning of § 12 of the Clayton Act is made on a case by case approach. It requires an examination of the particular facts involved and turns on "an appraisal of the unique elements of a particular situation." *United States v. Scophony Corp., supra*, 333 U.S. at 819 (Frankfurter, J., concurring).

Although each case must be considered on its own facts, it is well accepted that corporations "transact business" within a district by purchases of business services as well as sales activities and that continuous and regular business activity within the district amounts to transacting business even if only small amounts are involved. See Black v. Acme Markets, Inc., 564 F.2d 681, 687 (5th Cir. 1977); Bd. of County Commissioners v. Wilshire Oil Co. of Texas, 523 F.2d 125, 129 (10th Cir. 1975); In Re Chicken Antitrust Litigation, 407 F.Supp. 1285, 1212 (N.D. Ga. 1975); Fashion Two Twenty Inc. v. Steinberg, 339 F.Supp. 836 (E.D. N.Y 1971); Crusader Marine Corp. v. Chrysler Corp., 281 F.Supp. 802, 804 (E.D. Mich. 1968).

The decision of the Court below does not depart from these settled principles, nor do Petitioners Miller and Colgan seriously contend to the contrary. Indeed, the decision below reflects the court's careful application of these principles to the evidence of Miller's and Colgan's substantial and continuous purchases of services and materials from Maryland based NECA. That undisputed evidence showed Colgan and Miller both purchased yearly from NECA such important business items as labor relations services, marketing services, electrical code making services, lobbying, manuals of labor and overhead costs, business studies, etc. Substantial amounts—$30,542.10 and $48,327.16 for Colgan and Miller respectively, in 1977 alone—were expended for these services and materials. And, according to Petitioner's officials, the services were vital to their companies' ability to conduct business. Hence, the decision below not only follows the correct venue analysis established by this Court but is clearly supported by the record evidence.

Petitioners in this Court dispute not the legal principles of venue applied below but the analysis of the evidence by the lower court. They contend that because the services and materials were purchased from a trade association these transactions lack any commercial significance and cannot satisfy the "transacting business" test. This contention is not only unsupported by any authority but is directly contradicted by the evidence. Neither the statute nor the decided cases exempt services purchased from a trade association from the definition of "transacts business" nor erases their commercial import. Furthermore, all the evidence is to the contrary: Petitioners' officials uniformly testified that these services were of great commercial significance to their companies.

In short, if Colgan and Miller had purchased the identical marketing, public relations and labor relations services and materials from individual Maryland companies rather than from NECA, there would be no question that

these Defendants were transacting business in Maryland. The fact that the same services were purchased from NECA cannot require a different result.

The cases cited by Petitioners do not support their claims. Those cases simply reflect the application of venue principles to factual situations markedly different than this case. For example, *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053 (E.D. Pa. 1969) is clearly distinguishable from the facts of this case for the reasons explained by the district court below. Colgan & Miller Appendix at 48a. *Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n*, 102 F.Supp. 649 (D. Minn. 1951) similarly bears no resemblance to this case. There, although an association was found not to be transacting business in Minnesota merely because of its membership in a Minnesota organization, there was no evidence as in the instant case that the Association received any commercial services from its membership or was involved in any business transactions by virtue of its membership.

Equally frivolous are Petitioners' assertions that the decision below will have "unprecedented and far reaching effects" by causing all trade association members to become venued in the district of their association's headquaters. *Colgan & Miller Petition* at 5, 12. Venue analysis depends on the circumstances of each case. In most instances trade association membership consists of insubstantial membership dues obligations in return for limited, non-commercial services. Accordingly, members of those associations will not automatically be venued in the district where their association is headquartered.

However, where, as in this case, the record reveals a trade association such as NECA, that offers its members substantial business services, and members such as Colgan and Miller agree to expend many thousands of dollars each year for these services, these corporations cannot

dispute that they are transacting business with the association in the ordinary and usual sense.

Based on this record evidence the court below was manifestly correct in concluding the following:

> It is the continuity of the transactions and their importance to the companies, as well as the dollar amounts, which lead the court to conclude that both Colgan and Miller were and are "transacting business" with NECA within the meaning of 15 U.S.C. § 22.

Colgan & Miller Appendix at 50a.

B. The Record Evidence Supports the Court's Decision That Miller and Colgan's Transactions Were With NECA's Maryland Headquarters and Not NECA's Local Chapters

Petitioners urge review of the decision below on the ground that venue was predicated upon "indirect transactions." Petitioners sole support for this argument is their claim that their transactions were exclusively with NECA's separately incorporated local chapters located outside Maryland rather than with National NECA, which is headquartered in Bethesda, Maryland. *Colgan & Miller Petition* at 4, 7, 14-15.

This contention not only is erroneous but it raises issues relating only to the sufficiency of the record, issues which are unworthy of this Court's review. The court below did not predicate venue on indirect transactions with local NECA chapters outside Maryland. Rather, it rested its decision on the record evidence of Petitioners' transactions with Maryland based National NECA.

That evidence makes manifest the correctness of the decision below. The district court, in rejecting this contention, summarized the evidence as follows:

> [A]lthough many of the companies' dealings with NECA were through the local chapters, the court

> finds that both Miller and Colgan were in effect "transacting business" with national NECA in Bethesda, Maryland, as well as with the local chapters. The payments listed above went to the national headquarters in Maryland, in return for the services both companies prized very highly. Publications and other materials distributed through the local chapters were developed and produced at the association's national headquarters. Autrey deposition at 54-55; Colgan deposition at 72. It would be not only unrealistic, but also contrary to the liberal interpretation afforded § 22, to deny that the two companies' transactions with NECA were transactions with an association in the state of Maryland.

Colgan & Miller Appendix at 50a.

The record evidence showed that while Colgan and Miller sent their payments for NECA services to the local chapters, their expenditures for these services were earmarked for National NECA in Bethesda, Maryland to pay for services National NECA produced. The local NECA chapters acted only as collection agents or brokers for National NECA in collecting and forwarding these payments to National NECA in Bethesda, and in distributing to Colgan and Miller the services produced by National NECA in Maryland. Colgan and Miller, who belonged to National NECA as well as local NECA chapters, both knew these sums were to be sent to National NECA and also knew that the services they received were generated, prepared and produced by National NECA. (R. at 230, 232-33, 236, 237-38, 581-616, 193, 197, 567, 571, 574-76).[3]

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[3] "R." refers to the Joint Appendix filed in the Fourth Circuit. Indeed, if Colgan's and Miller's claim could be believed, it would mean that no NECA members paid fees to National NECA and that National NECA would have neither income nor membership. The evidence, however, undisputedly shows National NECA with a budget that calls for income and expenditures of almost $6,000,000 in 1979.

Finally, the lower court's decision that Petitioners' expenditures were not "indirect" transactions with National NECA fully accords with decisions of numerous other courts which have considered similar arguments. See *Black v. Acme Markets, Inc.*, 564 F.2d 681, 687 n. 10 (5th Cir. 1977; *State of Illinois v. Harper & Row Publishers, Inc.*, 308 F.Supp. 1207, 1209 (N.D. Ill. 1969); *Hartley & Parker, Inc. v. Florida Beverage Corporation*, 307 F.2d 916 (5th Cir. 1962); *Green v. U.S. Chewing Gum Mfg. Co.*, 224 F.2d 369 (5th Cir. 1959); *Hitt v. Nissan Motor Company, Ltd.*, 399 F.Supp. 838, 843-44 (S.D. Fla. 1975).

CONCLUSION

For all of the foregoing reasons Colgans' and Miller's Petition for a writ of certiorari should be denied.

Resectfully submitted,

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